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No. 82-587

In the Supreme Court of the United States

OCTOBER TERM, 1982

RONNIE D. MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was unlawfully seized when approached by two federal drug enforcement agents.

2. Whether petitioner was arrested without probable cause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-15a) is reported at 675 F.2d 802. The oral opinion of the district court is reproduced at Pet. App. 17a-21a.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1982. A petition for rehearing was denied on July 12, 1982. The petition for a writ of certiorari was filed on October 4, 1982, as of September 10, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following denial of his suppression motion and a non-jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possession of 220 grams of cocaine with intent to distribute it, in

violation of 21 U.S.C. 841(a)(1). He was sentenced to two years' imprison ment to be followed by a three-year special parole term. The court of appeals affirmed (Pet. App. 2a-15a).

As set forth in the decision of the court of appeals (Pet. App. 3a-13a), evidence developed at a suppression hearing showed that on the afternoon of March 6, 1980, four drug enforcement agents dressed in plain clothes were on duty at the Detroit, Michigan, airport watching passengers arriving on a flight from Ft. Lauderdale, Florida. Petitioner was among the first passengers to disembark. He furtively scrutinized the other people in the flight area and continued to glance about nervously as he made two telephone calls. Petitioner then walked down the corridor on the upper level of the terminal, bypassing the staircase leading to the baggage claim area for his flight. He continued on to an adjacent terminal, exited from the terminal briefly via the upper level doors, then turned around abruptly, re-entered the terminal, and took an escalator to the ground level. At that point he walked out the door toward a taxi stand. Because petitioner had arrived from a source city for narcotics, had apparently traveled first class as drug couriers often do, had nervously engaged in unusual furtive surveillance of people around him, and had taken an unusually circuitous route through the terminal, the agents decided to investigate further by speaking with petitioner (Tr. 34-41).[1]

Two of the agents approached petitioner, while the other two remained inside the terminal. Agent Robert Dunn identified himself and displayed his badge. No weapons were displayed; no physical force or restraint was employed. Agent Dunn asked petitioner if he could talk to him, and petitioner responded that he could. Dunn next asked if he

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[1] "Tr." denotes the transcript of the suppression hearing.

could see some identification, and petitioner, trembling, handed the agent a Michigan driver's license. Agent Dunn then inquired whether petitioner was arriving or departing. Petitioner replied that he had come to the airport to catch a flight but had missed it and was going back home. When Agent Dunn asked whether petitioner hadn't just arrived from Florida, petitioner replied: "Not that I recall" (Tr. 41-46). Petitioner also denied having an airline ticket with him (Tr. 48).

At this point, Agent Dunn explained that he and his partner were federal narcotics agents looking for narcotics traffickers. Petitioner answered in the negative when asked if he had any narcotics on his person or in his briefcase. While still outside the terminal, he gave his consent to a search of his briefcase. When Agent Dunn suggested that he conduct the search inside the terminal, out of the view of the public, petitioner agreed to this procedure (Tr. 46).[2] Once inside the terminal, and still in a public area, Agent Dunn explained that petitioner had a right to refuse the search, but petitioner again stated that he had no objection and unlocked the briefcase. Agent Dunn examined its contents, finding two new T-shirts with printing indicating that they were from Florida, a first class airline ticket for the Ft. Lauderdale flight on which petitioner had arrived, and two pieces of paper with notations, including one in particular that Agent Dunn concluded was narcotics related.[3] The briefcase did not contain a change of clothing (Tr. 47-51).

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[2]Petitioner's driver's license was returned to him before he reentered the terminal (Tr. 47).

[3]The suspicious notation read "1800" — which is roughly the price per ounce of cocaine (Tr. 50-51).

Agent Dunn next asked petitioner's consent to pat him down to make sure that there were no narcotics on his person. Petitioner began to tremble, had difficulty speaking, and objected to the pat-down. Dunn then informed petitioner that he believed petitioner possessed narcotics, and arrested him. He frisked petitioner and found cocaine in his coat pocket. Following the arrest, Agent Dunn advised petitioner of his rights. Petitioner nevertheless volunteered that he was guilty and that he had recently sold his house and used the proceeds to purchase the cocaine (Tr. 51-54).

The district court denied petitioner's motion to suppress the cocaine and his statements, in an oral opinion (Pet. App. 17a-21a), finding that the initial contact between petitioner and Agent Dunn was not a seizure and that in any event, if deemed an investigatory stop, was justified by reasonable suspicion. The court further held that the ensuing arrest was supported by probable cause.[4]

The court of appeals affirmed, holding that petitioner was not seized when first approached by the agents. The court found that the agents' approach was non-threatening and was merely a request to talk with petitioner. The court further held that although in its view the facts known to the agents when they first engaged petitioner in conversation did not constitute reasonable suspicion, petitioner's responses and the items found in his briefcase ultimately provided the agents with probable cause for his arrest (Pet. App. 14a-15a).

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[4]In making this determination, the court excluded from consideration petitioner's refusal to consent to the pat-down search of his person (Pet. App. 19a-21a).

ARGUMENT

Petitioner contends initially that he was seized within the meaning of the Fourth Amendment when Agent Dunn first spoke to him outside the airport terminal. He argues that the Fourth Amendment is implicated any time that a law enforcement officer engages in conversation with an individual who is suspected of criminal activity without first telling the individual that he is free to leave. Under petitioner's theory, a seizure thus occurs even if the police by their conduct have imposed no restraint upon the individual's liberty. Petitioner also claims that a drug courier profile may not be used to establish a reasonable suspicion justifying an investigatory stop. Finally, petitioner challenges the determination by both courts below that his arrest was supported by probable cause. Petitioner's contentions, insofar as they are properly presented in this Court, are without merit. The decision of the court of appeals does not conflict with any decision of this Court or of any decision of any other court of appeals and does not otherwise warrant review.

1. Contrary to petitioner's initial contention (Pet. 9-13), this Court has recognized that not every encounter between a citizen and police officer constitutes a seizure within the meaning of the Fourth Amendment. On the contrary, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968); see also *id.* at 32-33 (Harlan, J., concurring); *id.* at 34 (White, J., concurring); *Sibron* v. *New York*, 392 U.S. 40, 63 (1968). As Justice Stewart elaborated in his opinion in *United States* v. *Mendenhall*, 446 U.S. 544, 554-555 (1980) (footnotes omitted):

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. * * * In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Applying this standard to the facts of *Mendenhall*, Justice Stewart explained that upon the facts presented there, no seizure had transpired (446 U.S. at 555):

> The events took place in a public concourse. The agents wore no uniforms and displayed no weapons. They did not summon [Mendenhall] to their presence but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest. [Mendenhall] was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official. * * * In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her

way, and for that reason we conclude that the agents' initial approach to her was not a seizure.

Our conclusion that no seizure occurred is not affected by the fact that respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed. See *Schneckloth* v. *Bustamonte*, [412 U.S. 218 (1973)].

Justice Stewart's analysis is fully applicable to this case as well.[5]

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[5]Petitioner does not suggest that the facts of his case distinguish it from *Mendenhall;* rather he calls for adoption of a sweeping rule that is contrary to this Court's decision in *Terry* v. *Ohio, supra,* 392 U.S. 19 n.16, and Justice Stewart's opinion in *Mendenhall.* Petitioner does, however, misstate certain facts respecting the encounter in his case. There is no record support for petitioner's assertion (Pet. 11) that "two DEA agents stepped in front of him and prevented his further travel" or that "Two other agents positioned themselves approximately ten feet behind the Defendant." As the court of appeals noted (Pet. App. 3a), the only testimony bearing on the original contact was that of the agents, which established that the encounter was casual and consensual (see Pet. App. 3a-4a (quoting testimony), 14a). This testimony showed that only two agents approached petitioner outside the terminal; the other two remained behind in the terminal and played no part in the encounter (Tr. 43).

In addition, petitioner's statement (Pet. 11) that the DEA agents testified that they could not say petitioner was free to leave is misleading. The actual exchange was as follows (Tr. 67):

Question (by Attorney Swor):	Was Mr. Moore free to leave when you approached him at the curb? If he had walked away from you, would you have just let him go?
Answer (by Agent Dunn):	(Pause). I, I don't really know. I'd have to be presented with the situation then and there.

To be sure, a majority of this Court has yet to reaffirm the standard of *Terry* and *Sibron* or endorse the opinion of Justices Stewart and Rehnquist in *Mendenhall*.[6] But because

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This circumspect answer obviously reflects the realities of law enforcement procedures entailing on the spot judgments as to whether constitutional standards for investigative detention under the Fourth Amendment are satisfied. In any event, there is no suggestion that Agent Dunn did or said anything to petitioner that communicated to him the belief that he was not free to go. The uncommunicated subjective intentions of the officer are legally irrelevant. *Scott* v. *United States*, 436 U.S. 128, 136-137 (1978).

[6]In *Mendenhall*, a majority of the Court did not reach the question addressed in Justice Stewart's opinion. Justice Powell, with whom the Chief Justice and Justice Blackmun joined, concluded that the encounter in that case, if a seizure, was supported by reasonable suspicion. 446 U.S. at 560. These Justices, who together with Justices Stewart and Rehnquist made up the majority upholding the lawfulness of the encounter in *Mendenhall*, intimated no doubt about the standard announced by Justice Stewart, reserving judgment only as to its application to the particular set of facts presented. *Id.* at 560 n.1. Justice White, joined by Justices Brennan, Marshall and Stevens in dissent, declined to reach the question whether Mendenhall had been seized, but the doubts he expressed pertained only to the application of the standard outlined by Justice Stewart to the facts of that case. *Id.* at 570 & n.3.

Petitioner erroneously suggests (Pet. 10) that the standard espoused by Justices Stewart and Rehnquist in *Mendenhall* was subsequently rejected by the Court in *Reid* v. *Georgia*, 448 U.S. 438 (1980). On the contrary, the question whether the airport contact was a seizure was not squarely presented in *Reid*. The only question decided was whether the encounter there was supported by reasonable suspicion. The Court found reasonable suspicion lacking and remanded the case for further proceedings. *Id.* at 441-442. Quoting *Terry* v. *Ohio*, *supra*, 392 U.S. at 19 n.16, the Court nevertheless reaffirmed that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred." 448 U.S. at 440 n.*. In his concurring opinion, Justice Powell made clear that the state court remained free upon remand to consider the question addressed by Justice Stewart in *Mendenhall*. 448 U.S. at 442-443. On remand, the state court did just that and concluded that the airport encounter was not a seizure. *State* v. *Reid*, 276 S.E. 2d 617, 621-622 (Ga.), cert. denied, 454 U.S. 883 (1981).

the courts of appeals,[7] like the court below,[8] have uniformly adopted that standard for determining whether a seizure has taken place, the broad question presented by petitioner does not warrant review by this Court.[9]

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[7]See, e.g., *United States* v. *Black*, 675 F.2d 129, 133-134 (7th Cir. 1982), petition for cert. pending, No. 81-2239 (filed June 3, 1982); *United States* v. *Beale*, 674 F.2d 1327, 1329-1330 (9th Cir. 1982), petition for cert. (on another issue) pending, No. 82-674 (filed Oct. 18, 1982); *United States* v. *Elsoffer*, 671 F.2d 1294, 1297 (11th Cir. 1982); *Gomez* v. *Turner*, 672 F.2d 134, 140-141 (D.C. Cir. 1982); *United States* v. *Berry*, 670 F.2d 583, 595 (5th Cir. 1982) (en banc); *United States* v. *West*, 651 F.2d 71, 72 (1st Cir. 1981), petition for cert. pending, No. 81-307 (filed Aug. 14, 1981); *United States* v. *Wylie*, 569 F.2d 62, 68 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978); see also *United States* v. *MacDonald*, 670 F.2d 910, 912 (10th Cir. 1982), cert. denied, No. 81-6955 (Nov. 15, 1982); *United States* v. *Harrison*, 667 F.2d 1158, 1161 (4th Cir. 1982), cert. denied, No. 81-6302 (June 14, 1982); *United States* v. *Price*, 599 F.2d 494, 498 (2d Cir. 1979); *State* v. *Reid*, *supra*, on remand from 448 U.S. 438 (1980).

[8]Petitioner appears to question (Pet. 13) whether the Sixth Circuit actually applied "Mr. Justice Powell's [sic] freedom to walk away standard" in this case, claiming that the "[c]ourt stopped far short of saying that the facts and circumstances involved in this case were such that the defendant could have reasonably concluded that he was not free to leave." It is true that the court of appeals did not expressly adopt Justice Stewart's formulation of the standard for determining whether a seizure has occurred. See Pet. App. 13a-14a. Yet this fact can scarcely aid petitioner, for the court of appeals' primary reliance was, instead, directly upon this Court's opinion in *Terry* v. *Ohio*, *supra*. In any event, read together with the court of appeals' prior opinion in *United States* v. *Jefferson*, 650 F.2d 854 (1981), and its subsequent opinion in *United States* v. *Tolbert*, No. 81-1485 (Nov. 11, 1982), slip op. 8, it is reasonably clear that the Sixth Circuit applied the formulation based on *Terry*, as elaborated by Justice Stewart in *Mendenhall* in this case.

[9]Although we do not believe that it is necessary to do so, the Court may prefer to hold the petition for future disposition in light of *Florida* v. *Royer*, No. 80-2146. The only question necessarily presented in that case is whether the police-citizen encounter there escalated into an arrest requiring probable cause. However, the question whether an initial consensual police-citizen encounter somewhat similar to that in this case is a seizure for Fourth Amendment purposes was briefed and argued in *Royer*. We note that the Court has recently denied certiorari

2. Petitioner next contends (Pet. 14-22) that an investigatory stop that does implicate the protections of the Fourth Amendment may not be predicated upon the "drug courier profile," an "informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics" (*Reid* v. *Georgia*, 448 U.S. 438, 440 (1980)). Such a profile draws on the collective knowledge and experience of drug enforcement agents and thus magnifies the predictive power of the individual observations conforming to such a profile made in an individual case. Cf. *United States* v. *Cortez*, 449 U.S. 411, 418-420 (1981); *Brown* v. *Texas*, 443 U.S. 47, 52 n.2 (1979). While conformity to a drug courier profile does not necessarily establish reasonable suspicion supporting an investigative detention in every case, were the issue presented we would argue that the fact that the actions of an individual being observed echo the actions of drug couriers apprehended in the past significantly enhances the predicate for suspicion. In this case, however, the decision of the court of appeals rested solely on a finding that the initial contact between Agent Dunn and petitioner was not a seizure. Indeed, the court of appeals agreed with petitioner that the facts known by the agents when they first walked up to petitioner did not give rise to reasonable suspicion of criminal activity (Pet. App. 15a). Accordingly, the utility of the drug courier profile in assessing reasonable suspicion is not at issue here unless the court of appeals' conclusion that there was no seizure is first set aside.

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in *Setzer* v. *United States*, No. 82-5409 (Nov. 29, 1982), which presented for review a question similar to that tendered by petitioner. However, the Court appears to be holding several cases that present the seizure vel non issue for future disposition. See *West* v. *United States*, No. 81-307 (filed Aug. 14, 1981); *Williams* v. *United States*, No. 81-1278 (filed Jan. 7, 1982); *Black* v. *United States*, No. 81-2239 (filed June 3, 1982); *Medina-Pena* v. *United States*, No. 81-6746 (filed May 18, 1982).

3. Finally, petitioner claims (Pet. 23-27) that his arrest was not supported by probable cause. A brief recitation of the facts known to the agents at the time of the arrest refutes his contention.[10] Petitioner traveled first class, as drug couriers often do, to Detroit from Ft. Lauderdale, a major source city for narcotics. He furtively surveyed the people in the airport terminal as he traveled a circuitous route out of the terminal building. When speaking to the agents, he lied, attempting to conceal the fact that he had just arrived from Florida,[11] and falsely claimed he had no ticket with him. He carried no baggage except a briefcase which contained no change of clothing. The briefcase did contain scraps of paper with a notation indicative of a narcotics transaction. Petitioner trembled and had difficulty speaking when asked to consent to a pat-down. Both courts below found these circumstances sufficient to establish probable cause; this fact-bound determination does not merit further review.

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[10]Petitioner suggests in passing (Pet. 9, 23) that he was arrested immediately upon the approach of the agents. He apparently does not present this issue for the Court's consideration, however (Pet. 23). In any event, petitioner's contention is not only irreconcilable with *Terry* v. *Ohio*, *supra*, 392 U.S. at 19 n.16, which makes clear that such encounters are not seizures vel non, but also with *Michigan* v. *Summers*, 452 U.S. 692, 696-701 (1981), which makes clear that not all police-citizen investigative encounters entailing a restraint upon liberty are tantamount to an arrest requiring probable cause.

[11]Petitioner's statement (see page 3, *supra*) simply cannot be fairly characterized as mere "unwillingness to cooperate with law enforcement agents" (Pet. 24). Petitioner did not merely decline to cooperate; he deliberately misled the agent. We note, moreover, that petitioner's suggestion that this conduct be regarded as evidencing only a preference not to cooperate cannot readily be reconciled with his argument (Pet. 13) that he could not reasonably have believed himself free to leave.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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